



## The Advertising Association

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### **RESPONSE OF THE ADVERTISING ASSOCIATION TO THE CONSULTATION BY THE DEPARTMENT FOR BUSINESS, ENTERPRISE & REGULATORY REFORM ON “EXTENDING THE SCOPE OF APPLICATION OF THE REGULATORS’ COMPLIANCE CODE AND THE PRINCIPLES OF GOOD REGULATION” (URN 08/1405)**

#### **1. Preamble**

1.1. The Advertising Association is a federation of trade bodies and organizations representing the advertising and promotional marketing industries, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry that was worth over £19 billion in 2007. Further information about the Advertising Association, its membership and remit can be found at the following location: <http://www.adassoc.org.uk/>

#### **2. Introduction & Summary**

2.1. The Advertising Association welcomes the opportunity to respond to this consultation on “Extending the scope of the application of the Regulators’ Compliance Code and the Principles of Good Regulation” (URN 08/1405) being conducted by the Better Regulation Executive (BRE) of the Department for Business, Enterprise & Regulatory Reform (DBERR). The BRE is, via URN 08/1405, seeking views on the application of the above to: specified functions of local authorities in the devolved administrations; to specific functions of public sector regulators; and, to the functions of some national regulators that were omitted from the original Legislative and Regulatory Reform (Regulatory Functions) Order 2007<sup>1</sup>. The 2007 Order was made under powers conferred by section 24 of the Legislative and Regulatory Reform Act 2006.

2.2. From the perspective of the Advertising Association, if the proposals are adopted they should ensure that consistency in areas like consumer credit advertising<sup>2</sup> (as currently enforced by the 389 local trading standards services in England and the other 80 located in the devolved administrations) is enhanced throughout the territory of the United Kingdom.

2.3. In summary, in this response, the Advertising Association:

(a) supports the application of the Regulators’ Compliance Code (RCC) and the principles of better regulation<sup>3</sup> to those reserved functions that are exercised by the devolved administrations in Scotland, Northern Ireland and Wales (and calls for the method of achieving this legislatively to reflect as closely as possible the legal framework that obtains in England);

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<sup>1</sup> Statutory Instrument No. 2007/3544

<sup>2</sup> Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) is cited in the 2007 Order and is the primary legislation from which the statutory regulation of consumer credit advertising by local trading standards services derives.

<sup>3</sup> These requirements are listed in section 21 (“Principles”) of the 2006 Act.

- (b) considers that it would be logical for the RCC and the principles of better regulation to apply to all those public sector regulators whose functions affect businesses (or indeed third sector organisations);
- (c) agrees as comprehensive the list drawn up by the BRE of those new regulatory functions awarded since the original 2007 Order was prepared to regulators already specified therein that should be subject to the RCC and the principles of better regulation;
- (d) calls attention to the existence of three regulators, whose regulatory functions (which cover advertising-related activities) are cited in the 2007 Order, but which do not themselves currently appear therein;
- (e) seeks confirmation as to which Part of any revised Order, the list of enactments under or by virtue of which all the regulatory functions exercised by local authorities in Scotland, Northern Ireland and Wales will be subject to the RCC and the principles of better regulation;
- (f) is of the view that the BRE, as part of its “tidying up” consolidation exercise following this consultation, should take the opportunity to specify on the face of any revised Order two sets of Statutory Instruments that provide the legal underpinning for much advertising regulation in the United Kingdom;
- (g) recommends that any revised Statutory Instrument prepared by the BRE correctly reflect in its list of enactments any legislation that may have been partially repealed since the 2007 Order was laid;
- (h) proposes that the BRE attempts to future-proof any revised Order in respect of relevant secondary legislation already cited in the original 2007 Order that may be revoked and re-made on an annual or regularised basis; and,
- (i) concludes that the assumptions made by the BRE in the draft Impact Assessment attached to URN 08/1405 are realistic and that the benefits that accrue from the proposals of the Executive will, if adopted, significantly outweigh any costs associated with them.

2.4. The Advertising Association, which responds to all but two of the questions posed by the BRE, looks forward to publication in March 2009 by the Government of its response to the submissions it receives to this consultative exercise being conducted by the Executive. The Advertising Association notes that the UK Government is committed to reviewing the impact of the RCC itself in 2011. The Advertising Association is not seeking for any part of this submission to be treated as confidential.

### **3. Response of the Advertising Association to issues raised by BRE in URN 08/1405**

#### **3.1. Application of the Code and Principles in Scotland, Northern Ireland and Wales**

*Question 1: Do you support the application of the Compliance Code and the Better Regulation principles to reserved functions exercisable by the devolved administrations (Scotland, Northern Ireland and Wales)? If not, please tell us why?*

3.1.1. Yes, the Advertising Association considers that the extension of the application of the RCC and the principles of better regulation to those reserved functions exercisable by the devolved administrations in Scotland, Northern Ireland and Wales is both appropriate and fully justified. As the BRE identifies, businesses located within the devolved administrations are just as likely to be affected by local enforcement of regulations by, for example, trading standards services as their counterparts in England. Such businesses are therefore equally deserving of the safeguards provided by the RCC and the embedding of better regulation principles in the activities of the enforcement authorities to which they answer as their counterparts are in England. Indeed English businesses having operations in Scotland, Northern Ireland and Wales should also be beneficiaries of the proposals. The Advertising Association therefore fully supports the proposals of the BRE in the interests of regulatory consistency and the creation of a level playing field for businesses that might be expected to

accrue from the RCC and better regulation principles applying throughout the territory of the United Kingdom. (Please also see the comments that the Advertising Association has provided on the draft Impact Assessment conducted by the BRE in Paragraphs 3.4.1 and 3.4.2 of this response below.)

*Question 2: Do you agree that we should adopt the same approach with regard to local authorities in the devolved administrations as we have with regard to national regulators and Minister's functions in the original order?*

3.1.2. The Advertising Association considers that any amendments to the 2007 Order should, so far as is possible, ensure that their practical effect is to maximise the extent to which the legislative frameworks under which local authorities in England, Scotland, Northern Ireland and Wales operate are as similar as possible. If that is the effect of the BRE adopting the same approach with regard to local authorities in the devolved administrations as it has with regard to national regulators and Ministerial functions in the original 2007 Order, then the Advertising Association would support the amendments proposed by the Executive.

### **3.2. Application to public sector regulators**

*Question 3: Do you support the application of the Compliance Code and the Principles of Good [sic] Regulation to the regulatory functions of the above public sector regulators that affect business or Third Sector organisations? If not, please tell us why.*

3.2.1. As far as the Advertising Association is aware none of the public sector regulators that the BRE cites<sup>4</sup> has any responsibility currently for regulatory functions impacting on advertising. Nevertheless, the proposal to apply the RCC and the principles of better regulation to the public sector regulators cited by the BRE, given their impact on businesses (and third sector organisations) more widely, appears logical and sensible and it is for this reason that the Advertising Association would support such a move.

### **3.3. Amendments to include other relevant functions and reflect changes in the regulatory landscape**

*Question 6: Do you agree with the proposed list of additional regulatory functions set out in section 3 of Annex B of the Consultation Document? If not, please tell us why.*

3.3.1. The Advertising Association agrees with the proposed list of additional regulatory functions set out in section 3 of Annex B of URN 08/1405 (but please also see the substantive comments of the Advertising Association in response to Question 8 below). The Advertising Association would, however, take this opportunity to draw the attention of the BRE to the existence of a minor typo in that sub-section setting out those regulators covered by the original 2007 Order, but whose functions have subsequently been altered or modified by legislation. The typo is to be found under the Companies House heading in the list of new regulators with relevant functions: the amendment should read "Parts 5 and 41 of the Companies Act 2006" rather than the BRE has it currently.

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<sup>4</sup> The Information Centre for Health & Social Care; the Postgraduate Medical Education & Training Board; the Care Quality Commission; the General Social Care Council; the Office for Standards in Education, Children's Services and Skills; the Criminal Records Bureau; and, the Audit Commission.

*Question 7: Are there any regulators or regulatory functions not included in section 3 of Annex B of the Consultation Document that should be included? If yes, please tell us which and why.*

3.3.2. The Advertising Association is aware of three existing regulators which have relevant functions specified in the Schedule to the original 2007 Order, but whose names are absent from Part 1 thereof and also fail to appear in section 3 of Annex B of URN 08/1405.

3.3.3. In this context, the Advertising Association notes that whilst, for example, both the Medicines (Advertising) Regulations 1994<sup>5</sup> and the Medicines (Monitoring of Advertising) Regulations 1994<sup>6</sup> feature in the 2007 Order, the regulator responsible for the enforcement of them – namely the Medicines & Healthcare products Regulatory Agency (MHRA) – is not specified in Part 1 of the Schedule to the Statutory Instrument. Consequently, the Advertising Association considers that the MHRA should be cited in any amended version of the 2007 Order.

3.3.4. Meanwhile, the Advertising Association notes that whilst the Passenger Car (Fuel Consumption and CO<sub>2</sub> Emissions Information) Regulations 2001<sup>7</sup> feature in the 2007 Order, the regulator responsible for the enforcement of the advertising requirements thereof – namely the Vehicle Certification Agency (VCA) - is not specified in Part 1 of the Schedule to the Statutory Instrument. Consequently, the Advertising Association considers that the VCA should be cited in any amended version of the 2007 Order.

3.3.5. Furthermore, the Advertising Association notes that whilst the Veterinary Medicines Regulations 2007<sup>8</sup>, which also contain provisions relating to advertising, feature in the 2007 Order, the regulator responsible for the enforcement of them – the Veterinary Medicines Directorate (VMD) – is not specified in Part 1 of the Schedule to the Statutory Instrument. Consequently, the Advertising Association considers that the VMD should be cited in any amended version of the 2007 Order. (The Advertising Association comments further on the reference to the Veterinary Medicines Regulations contained within the 2007 Order in Paragraph 3.3.10 of this response, but for reasons unrelated to the absence of a reference to the VMD in Part 1 of the Schedule to the Statutory Instrument.)

*Question 8: Are there any comments you would like the Government to consider in relation to the proposal to amend the Listing Order and extend the coverage of the Compliance Code and the Principles of Good [sic] Regulation to regulatory functions not currently covered?*

3.3.6. In addition to the comments made above in respect of section 3 of Annex B of URN 08/1405, the Advertising Association would also take this opportunity to make observations in respect of the current content of the 2007 Order and, where relevant, make proposals for further amendment. These observations and proposals are contained within Paragraphs 3.3.7 – 3.3.10 below.

3.3.7. The Advertising Association notes that in section 1 of Annex B of URN 08/1405, the BRE does not specify which Part of the 2007 Order the list of enactments under or by virtue of which all the regulatory functions exercised by local authorities in Scotland, Northern Ireland and Wales will be subject to, for example, better regulation principles. The Advertising Association assumes that the reference should be to Part 3 of the Schedule to

<sup>5</sup> Statutory Instrument No. 1994/1932 (as amended)

<sup>6</sup> Statutory Instrument No. 1994/1933 (as amended)

<sup>7</sup> Statutory Instrument No. 2001/3523 (as amended)

<sup>8</sup> Statutory Instrument No. 2007/2539

the 2007 Order and anticipates that this will be addressed in any amended version of that Statutory Instrument which the BRE prepares.

3.3.8. The Advertising Association agrees that the present approach of Departments inserting references to the 2007 Order in any new regulations they make is more logical than re-making the former each time, but notes the intention of the BRE to use the current consultation as an opportunity to conduct a one-off “tidying up” or consolidation exercise in this field. The BRE notes, for example, that DBERR inserted references to the 2007 Order in the Consumer Protection from Unfair Trading Regulations 2008<sup>9</sup> and the Business Protection from Misleading Marketing Regulations 2008<sup>10</sup>, which both contain key advertising-related provisions. (The legislative vehicle for achieving this was actually Paragraph 115 within Part 2 (“Amendments to other legislation”) of Schedule 2 (“Amendments”) of the Consumer Protection from Unfair Trading Regulations 2008 alone.) The Advertising Association considers that for ease of reference it would be beneficial were these two sets of Regulations to be cited in any revised Order, given that they do not currently appear on its face. Clearly these two Statutory Instruments should not be treated as a special case and the Advertising Association would thus recommend that the same approach be adopted in respect of all legislation that reached the statute books – like the Cosmetic Products (Safety) Regulations 2008<sup>11</sup> - between the 2007 Order coming into being and the laying of any revised Order. This is because the Order will be the obvious place for interested parties to look to check which legislation places a statutory obligation on regulators to abide by the RCC and the principles of better regulation. The Advertising Association appreciates that there is no appetite on the part of the BRE to revisit the content of the Order on a regular basis and is supportive of the current approach, but it can see merit in following the approach set out above as part of this proposed one-off “tidying-up” exercise.

3.3.9. In the context of the Consumer Protection from Unfair Trading Regulations 2008 it is notable that that Statutory Instrument had the effect of repealing a number of elements of the Consumer Protection Act 1987. The 1987 Act is cited in Parts 2 and 3<sup>12</sup> of the Schedule to the 2007 Order. The Advertising Association would recommend that the BRE check whether it would be more accurate to refer in the 2007 Order only to those elements of the 1987 Act that remain in force and relevant, which appears to be the approach already adopted elsewhere in the Schedule. (The Advertising Association is unable to identify if there are any other pieces of legislation cited in Parts 2 and 3 of the Schedule to the 2007 Order that it considers the BRE should treat in the same way as is proposed here for the 1987 Act.)

3.3.10. The Advertising Association would draw the attention of the BRE to the references to the Veterinary Medicines Regulations 2007<sup>13</sup> in Parts 2 and 3 of the Schedule to the 2007 Order. The Veterinary Medicines Regulations, which contain advertising-related provisions, implement Directive 2001/82/EC “on the Community code relating to veterinary medicinal products”. For various entirely logical policy reasons (including the need to update fee-related references annually, to take account of inflation and the like), the Department for Environment, Food & Rural Affairs (DEFRA) revokes and re-makes the Veterinary Medicines Regulations each autumn and has done the same since they first came into force in October 2005. The current reference to the 2007 Regulations is now therefore obsolete and any updated version of the 2007 Order should at the very least reflect the latest version of the Veterinary Medicines Regulations available - as part of the “tidying-up” exercise proposed by

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<sup>9</sup> Statutory Instrument No. 2008/1277

<sup>10</sup> Statutory Instrument No. 2008/1276

<sup>11</sup> Statutory Instrument No. 2008/1284

<sup>12</sup> The reference in Part 2 of the 2007 Order is to a single sub-section – 27(2) – of the 1987 Act in the context of medicines regulation: as far as the Advertising Association is aware that provision remains in force. The reference in Part 3 of the 2007 Order is to the 1987 Act in its entirety.

<sup>13</sup> Statutory Instrument No. 2007/2539

the BRE. (The current version is the Veterinary Medicines Regulations 2008<sup>14</sup>, but dependent on when the Order is eventually amended a more up-to-date set of the Regulations may by then be available.) A more satisfactory solution would be for any amended 2007 Order somehow to reflect the regularly evolving nature of the Veterinary Medicines Regulations, if that were possible. (The Advertising Association is unable to identify any other pieces of legislation appearing in Parts 2 and 3 of the 2007 Order that may operate similarly to the Veterinary Medicines Regulations – in other words, are revoked and re-made on a regular basis.) Finally, the Advertising Association would also have the BRE note that unlike the approach of DBERR in respect of, for example, the Consumer Protection from Unfair Trading Regulations 2008, DEFRA does not cite the 2007 Order in the Veterinary Medicines Regulations 2008.

### **3.4 Draft Impact Assessment**

*Question 9: Do you think that the assumptions made in the draft Impact Assessment are realistic? If not, please be specific about why you think they are not.*

3.4.1. The Advertising Association considers that the assumptions made in the draft Impact Assessment conducted by the BRE are realistic. The proposals of the BRE should serve to streamline bureaucracy thereby helping companies to boost their growth and competitiveness by providing a more consistent and efficient 'light touch' regulatory environment within which to operate for businesses large and small. The proposals, if adopted, should have a particularly beneficial impact on businesses having sites in more than one local authority: within the devolved administrations; between the devolved administrations; and, those with sites in England (but operating elsewhere in the United Kingdom) which already benefit greatly from the existing regime<sup>15</sup>. Thus the Advertising Association considers that the proposals are likely to be of significant benefit to firms and are extremely unlikely to impact adversely upon them.

*Question 10: Does the Impact Assessment reflect a reasonable estimate of the costs and benefits of complying with the Compliance Code and the Better Regulation principles? If not, please set out the specific data that you feel should be considered in developing our final analysis.*

3.4.2. The Advertising Association is unable to comment in detail on whether the draft Impact Assessment at Annex F of URN 08/1405 reflects a reasonable estimate of the costs and benefits involved in the extension of the scope of the RCC and the principles of better regulation. The Advertising Association would, however, share the conclusion drawn in the draft Impact Assessment by the BRE that the overall benefits of pursuing the proposals of the Executive will significantly outweigh any of the associated costs that have been identified.

12 February 2009

<sup>14</sup> Statutory Instrument No. 2008/2297

<sup>15</sup> Scotland has 32 local authorities; Northern Ireland has 26 local authorities; Wales has 22 local authorities; and, England has 389 local authorities.